SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 210

JAMES T. STEVENS, PETITIONER,

vs.

CHARLES MARKS, JUSTICE OF THE SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL DEPARTMENT IN THE COUNTY OF NEW YORK

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 26, 1965

[fol. 1]

IN THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL DEPARTMENT IN THE COUNTY OF NEW YORK

In the Matter of
The Application of

JAMES T. STEVENS, Petitioner,

—against—

The Honorable CHARLES MARKS, Justice of the Supreme Court of the State of New York, County of New York, Respondent,

To review and annul, pursuant to Article 7801 of the Civil Practice Laws and Rules the adjudication and the Order and Warrant of Commitment dated July 30, 1964, adjudging Petitioner in Criminal Contempt of Court, and punishing him therefor.

NOTICE OF MOTION—Dated September 28, 1964

Sirs:

Please Take Notice that upon the annexed petition of James T. Stevens sworn to the 27th day of August, 1964, and upon the Mandate of Order dated July 30, 1964, the Waiver of Immunity dated June 26, 1964, the Termination of Employment dated July 15, 1964, the Stenographer's Minutes dated July 28, 1964, a Special Proceeding brought pursuant to 7801 of the C.P.L.R. and Section 762 of the Judiciary Law, shall be returnable at a Motion Term of the Appellate Division appointed to be held in and for the First Department at the Appellate Division Courthouse, Madison Avenue and 25th Street, City of New York, on the 6th day of October 1964 at 1 P.M., why the Order of Mandate dated July 30, 1964 should not be declared annulled and why the $250 fine paid by the Petitioner should

not be remitted to the Petitioner and granting such other and further relief as justice requires.

Dated: New York, New York, September 28, 1964.

Molony & Schofield, Esqs., Attorneys for Petitioner, 137 So. Main Street, New City, Rockland County, New York.

[fol. 2] cc: The Honorable Frank S. Hogan, 155 Leonard Street, New York 13, New York.

Chief Clerk of the Supreme Court, New York County, 60 Centre Street, New York, New York.

[fol. 4]

ATTACHMENT TO NOTICE

IN THE APPELLATE DIVISION OF THE SUPREME COURT

FIRST JUDICIAL DEPARTMENT, COUNTY OF NEW YORK

In the Matter of
The Application of

JAMES T. STEVENS, Petitioner,

—against—

Honorable CHARLES MARKS, Justice of the Supreme Court of the State of New York, County of New York, Respondent,

To review and annul, pursuant to Article 7801 of the Civil Practice Laws and Rules the adjudication and the Order and Warrant of Commitment dated July 30, 1964, adjudging Petitioner in Criminal Contempt of Court, and punishing him therefor.

PETITION—Dated August 27, 1964

To the Honorable Presiding Justice and Associate Justice of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department:

The petition of James T. Stevens, respectfully shows and alleges:

1. This petition pursuant to Article 7801 of the C.P.L.R. and Section 752 of the Judiciary Law is made to obtain relief from a Mandate of Order made and entered by the Respondent on the 30th day of July, 1964, (a copy of which is annexed hereto and marked Exhibit 1) wherein he adjudged petitioner guilty of criminal contempt of court and sentenced him to a fine of $250.00 and to imprisonment for thirty days in the civil jail of the County of New York.

2. I am over twenty-one years of age, am a citizen of the United States, and at all times hereinafter mentioned was and still am a resident of 164 Engert Avenue, Brooklyn, County of Kings, State of New York.

[fol. 5] 3. Respondent, Honorable Charles Marks, was and now is a Supreme Court Judge of New York County.

4. Respondent, Supreme Court of New York County, is a duly constituted judicial tribunal, having jurisdiction of criminal offenses committed in New York County.

5. On June 25, 1964 while performing a four to midnight tour of duty, I was informed to report the next morning at 9:30 A.M. to the office of Deputy Chief Inspector, Joseph McGovern. When I reported to Inspector McGovern I was given a subpoena to report immediately to the New York County Grand Jury and a Captain Jones from that office was assigned to take me to the Grand Jury.

When I arrived at the Grand Jury, an Assistant District Attorney informed me that under the New York State Constitution and the New York City Charter, that I, as a member of the New York City Police Force had to sign a limited waiver of immunity or else my job would be terminated. According to the said subpoena, I was only appearing there as a witness and having received this legal advice from the District Attorney I immediately signed the said limited waiver of immunity. (A copy of which is annexed

hereto and marked Exhibit 2.) I was immediately taken into the Grand Jury Room and after identifying myself by rank, name and assignment, I was then once again advised with reference to the provisions of the State Constitution and the City Charter with reference to losing my job and also told that I had a right under the United States Constitution to refuse to answer any questions that might tend to incriminate me.

Immediately after being sworn, I was apprised by the Assistant District Attorney that I had been called there as [fol. 6] a potential defendant not as a witness and this was the first time I realized that I should have been advised by legal counsel of my choosing. However, since I had signed this waiver outside the Jury room, I did not now wish to immediately disclaim this document until I consulted an attorney. As a member of the New York City Police Department having completed 18 years of service towards a 20 year retirement, this act of signing was not done freely and voluntarily but done solely because of being threatened by the loss of my position and my pension rights.

On July 15, 1964, I was again subpoenaed to appear before the Third July 1964 Grand Jury and having now for the first time retained counsel to advise me and on the advice of my Attorneys, Molony & Schofield, Esqs., 137 So. Main Street, New City, Rockland County, New York, I claimed my rights not to incriminate myself under the Federal and State Constitutions. On this occasion I also asked to withdraw the limited waiver of immunity previously signed before the June Grand Jury. As a result, of this action, I received a letter from the Chief Clerk of the New York City Police Department terminating my employment. Said letter is dated July 16, 1964. (A copy of which is annexed hereto and marked as Exhibit 3.)

On July 22, 1964, I was again subpoenaed to appear before the First June 1964 Grand Jury at which time I again refused to answer standing on my state and federal

constitutional rights. I honestly and reasonably felt and believed that my testimony might disclose or tend to disclose, or might be construed as disclosing, facts or circumstances, or a link therein pointing or tending to point or to suggest criminal conduct on my part. I felt that this [fol. 7] would put me in jeopardy and expose me to the hazards of a criminal charge in connection with the matters in issue. My refusal to testify was not only under the fifth and fourteenth amendments but also based on the fact that I was not advised of my rights of counsel under the sixth and fourteenth amendments since I was not advised properly by the District Attorney.

Immediately after my refusal on July 22, 1964, I was taken to Supreme Court of the County of New York before the Honorable Charles Marks and was asked the following question:

> "Now I am going to ask you point blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York? Did you?"

My response was the same in which I previously and in good faith claimed my said Constitutional privilege, the Respondents refused to sustain the same, and directed me, under threat of punishment for criminal contempt, to answer the said question. Thereupon, on my refusal to answer the said question, the Respondents purported summarily to adjudicate me guilty of criminal contempt of court and postponed execution of sentence until July 28, 1964. When I appeared on that date my Attorneys, Molony & Schofield, appeared with me and gave their legal argument as to why the judgment of criminal contempt by the Honorable

Charles Marks should be vacated. (A copy of which is annexed hereto and marked Exhibit 4.) After hearing said argument the Court stayed the execution of sentence for five days for the purpose of making application to the Appellate Division for a stay pending appeal.

[fol. 8] On August 4, 1964, my Attorneys appeared before the Honorable Bernard Botein Presiding Justice of the Appellate Division and at that time he refused to stay the execution of my sentence and on August 5, 1964 I started serving my 30 days in the County Civil Jail of New York County located at 434 West 37th Street, New York City.

6. The said purported adjudication against me in criminal contempt of Court for said refusal to answer said questions, and the punishment imposed therefor are, under the circumstances disclosed, erroneous, illegal and unwarranted in that:

(a) The same were and are contrary to the provisions of both the Federal and State Constitutions with respect to my protection against self-incrimination and my right to counsel, and under said circumstances, constitute an unlawful invasion of my right and privilege and operate to deny to me the due process of law and the equal protection of the laws, within the meaning of both Constitutions, and constitute an arbitrary and capricious exercise of judicial power possessed by the Respondents.

(b) My refusal to answer such questions was not contumacious and not unlawful, within the meaning of Sec. 750 of the Judiciary Law, because such refusal was made in good faith and on advice of counsel.

(c) That I asked to withdraw my Limited Waiver of Immunity and since I had not given any relevant testimony to the Grand Jury it was arbitrary and capricious on the part of the Respondents, the District Attorney and the Grand Jury to refuse to allow me to withdraw the Limited Waiver of Immunity.

7. Except for this proceeding, Petitioner has no adequate remedy at law or in equity to review and annul the [fol. 9] said purported adjudication for criminal contempt, and to review and annul said Order and Warrant of Commitment, and this proceeding is expressly authorized by Section 752 of the Judiciary Law of the State of New York.

8. No previous application for the relief herein sought has ever been made.

Wherefore, I pray, that an order issue, directing Respondents and each of them, to show cause why I should not have a final order, pursuant to the provisions of Article 7801 of the C.P.L.R. and Section 752 of the Judiciary Law, annulling said purported determination and adjudication for criminal contempt of Court made by said Respondents against me, and annulling said Order and Warrant of Commitment, and granting such other and further relief in the premises as justice requires.

Dated: New York, New York, August 27, 1964.

James T. Stevens, Petitioner.

Duly sworn to by James T. Stevens, jurat omitted in printing.

[fol. 10]

EXHIBIT 1 TO PETITION

At a term of the Supreme Court in and for the County of New York; Part 30, thereof, June 1964 Term, at Criminal Courts Building, 100 Centre Street, Borough of Manhattan, City and County of New York, on the 30 day of July, 1964.

PRESENT:

Honorable CHARLES A. MARKS,

Justice.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JAMES T. STEVENS, a witness before the First June, 1964 Grand Jury of the County of New York.

Mandate of Order Adjudging Witness Guilty of Contempt.

The Grand Jury heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the County of New York, and now actually acting as the Grand Jury in and for the body of the said County of New York, come into court and make complaint by and through their foreman, theretofore duly appointed and sworn, and it appearing to the satisfaction of the court that James T. Stevens, on July 22, 1964, after being duly summoned and sworn in the manner prescribed by law as a witness, in a certain matter pending before such Grand Jury whereof they had cognizance, against John Doe et al., for the crimes of Conspiracy to Bribe a Public Officer and Bribery of a Public Officer did then and there

refuse to answer legal, proper and relevant questions which [fol. 11] were propounded to him and the said James T. Stevens, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The said James T. Stevens had on June 26, 1964 appeared before the said Grand Jury and having been advised of his rights was duly and properly sworn in the said matter after signing a limited waiver of immunity. The following took place before the said Grand Jury:

JAMES T. STEVENS, appeared as a witness, but was not sworn, testified as follows:

By Mr. Andreoli:

Q. What is your full name?
A. With the rank?
Q. Yes.
A. Lieutenant James T. Stevens.
Q. And where are you assigned?
A. 11th Division, Brooklyn.
Q. And you are a police officer of New York City Police Department?
A. Iam. I am.
Q. Lieutenant Sullivan—Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?
A. I do.
Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?
A. I do.
Q. Do you understand that under the Constitution of the United States you have the right to refuse to answer any questions that might tend to incriminate you; do you understand that?

[fol. 12] A. I do.

Q. Do you understand further that under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

A. I do.

Q. Are you prepared to sign a waiver of immunity?

A. I am.

Mr. Andreoli: May we have the witness sworn.

The Foreman: Please stand up and raise your right hand, Lieutenant.

(Whereupon the witness was duly sworn by the Foreman of the Grand Jury.)

By Mr. Andreoli:

Q. Lieutenant Stevens, your address is 164 Engets E-n-g-e-t-s, Avenue Brooklyn?

A. Yes.

Q. I show you Grand Jury Exhibit #16, and entitled People of the State of New York against John Doe, waiver of immunity. And it starts off: "I, Lieutenant James T. Stevens, 164 Engets Avenue, Brooklyn—" There appears to be a signature, "James T. Stevens," is that the—you signature?

A. Yes, sir.

Q. When you signed this, did you understand that this was a waiver of immunity, as I just described to you?

[fol. 13] A. I did, sir.

Q. And you understand the import of it?

A. I do.

Q. And was this signed in the presence of a notary?

A. It was.

Q. Lieutenant Stevens, among the questions this grand jury will ask you will be questions concerning your financial status; you understand that?

A. Yes, sir.

Q. Now, in order to simplify that and give you ample opportunity to give full thought and consideration to the questions concerning your financial statement, we have prepared a financial questionnaire; which I ask to have marked Grand Jury Exhibit #17.

(Marked as Grand Jury Exhibit #17 in evidence.)

Q. Would you look at it?

A. You want me to go through the whole thing?

By Mr. Scotti:

Q. Not now.

By Mr. Andreoli:

Q. Just glance at it so you know what it is. You are now directed to complete that questionnaire and sign it and swear to it and return to this grand jury on July 1st with that questionnaire completed; do you understand that?

A. Yes, sir.

Q. All right.

Mr. Andreoli: No further questions.

Any questions?

The Foreman: Should it be marked?
Mr. Andreoli: It is marked.
Thank you.

(Witness excused.)

[fol. 14] Thereafter on July 15, 1964 James T. Stevens appeared before Third of the July 1964 Grand Jury of the County of New York and the following took place:

JAMES STEVENS, Lieutenant, New York City Police Department, appeared as a witness, but was not sworn, stated as follows:

By Mr. Scotti:

Q. Is your name James Stevens?
A. That's correct, sir.
Q. Sit down, please. What is your rank?
A. Lieutenant.
Q. Where are you assigned?
A. Presently?
Q. Yes.
A. 11th Division.
Q. And previously?
A. Manhattan North.
Q. Now, lieutenant, you appeared before the First June 1964 Grand Jury not too long ago, correct?
A. That's correct.
Q. And you signed a waiver of immunity before that grand jury; is that correct?
A. To my understanding it was a partial waiver.
Q. A limited waiver of immunity?
A. Limited, that's correct.
Q. We explained it to you at that time?
A. That's correct, yes.
Q. Now, it becomes necessary for this grand jury to examine you before them in connection with the

investigation that's being conducted before this grand jury to determine whether there has been in existence a conspiracy to commit the crimes of bribery of a public officer in connection with the enforcement of the gambling laws of the state of New York.

[fol. 15] Are you willing to sign this waiver of immunity known as a limited waiver of immunity, which means that you waive immunity with respect to matters that are related to your official conduct or to the performance of your official duties?

A. I am not.

Q. You refuse to do so?

A. I refuse to do so.

Q. Well, now, you appreciate that under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct or to the performance of your official duties, you understand that?

A. I realize that, sir, yes.

Q. Even though you still have your constitutional privilege against self-incrimination?

A. Right, sir.

Q. That you can invoke at any time?

A. Right.

Q. But if you invoke that privilege then you are subject to the forfeiture of your position as a public officer?

A. I realize that.

Q. You know that? You appreciate the consequences of your failure to sign this limited waiver of immunity as required by the Constitution of the State of New York and the City Charter?

A. I do, sir.

Q. And you appreciate also that in view of the fact that you signed a waiver of immunity before the First

June Grand Jury, which is still in existence, that you may be required to appear before that grand jury and give testimony under such waiver, you understand that?

A. I—Mr. District Attorney, I believe I stated before that I had signed a partial waiver of immunity and, at that time, up until now I didn't have time to confer and discuss my case with any attorney. And at this time I have conferred with an attorney and upon his advice, he advised me to withdraw my partial waiver of immunity.

[fol. 16] Q. You mean your limited waiver of immunity?

A. Partial or limited, yes, sir, whichever.

Q. Well, now, do I take it then that you have no intention to give testimony before the First June Grand Jury?

A. I—at this time I wish to stand on my constitutional rights.

Q. But I'm asking you, if you should be called before the First June 1964 Grand Jury before which you executed a limited waiver of immunity, is it your intention not to answer questions?

A. I shall so ask to have my partial waiver nullified.

Q. In other words, I take it that it's your intention not to testify?

A. That's correct, sir.

Q. Is that correct? Well, now, as I explained to your lawyers outside, there's a serious question as to whether you can do that, but, nevertheless, that doesn't concern this grand jury at this time, and it doesn't affect your obligation as a public officer to sign a limited waiver of immunity before this particular grand jury, you understand that?

A. Yes, sir.

Q. So that I take it then that you refuse to sign this limited waiver of immunity as required by the consti-

tution and the—the Constitution of the State of New York and the Charter of the City of New York; is that right?

A. I do. I've been advised by my counsel now.

Q. You refuse to do so?

A. I do so, yes.

Mr. Scotti: You're excused.

Witness: Thank you.

(Witness excused.)

On July 22, 1964 the said James T. Stevens again appeared before the said First of the June, 1964 Grand Jury of the County of New York and the following took place:

[fol. 17] JAMES STEVENS, recalled as a witness, having been previously duly sworn, further testified as follows:

By Mr. Scotti:

Q. Your name is James T. Stevens?

A. That's correct, sir.

Q. Now, you appeared before this grand jury on June 26th of this year, you were sworn and you signed what was has been characterized as a limited waiver of immunity which was explained to you at the time; am I correct?

A. At this time I refuse to answer on my State and Federal—my constitutional rights.

Q. Well, if you recall, Mr. Stevens, Mr. Andreoli put to you a number of questions before you were sworn advising you that you were being called as a potential defendant and not as a witness, and finally asking you, after explaining the nature of the waiver of immunity, whether you were willing to sign this waiver of immunity, and you did sign this waiver of immunity; am I correct?

A. I refuse to answer on the grounds of violation of my constitutional rights.

Q. Well, on that occasion you were directed by the grand jury to fill out a financial questionnaire and return it to this grand jury filled out; am I correct?

A. I refuse to answer on the constitutional rights.

Q. I explained to you last time when you appeared with your attorney before another grand jury that in my opinion you are legally obligated to answer proper questions that relate to the nature of this investigation by virtue of the fact that you waived immunity as required of public officers by the constitution of the State of New York and the City Charter. I explained that to you; am I correct?

A. I refuse to answer on the grounds of—same answer.

Q. Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, [fol. 18] during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Law of the State of New York; did you?

A. I refuse to answer on the grounds of State and Federal constitution.

Q. I want to show you this waiver of immunity, Grand Jury Exhibit #16, entitled People of the State of New York against John Doe, et al., waiver of immunity, "I, Lieutenant James T. Stevens," is this the waiver of immunity you signed?

A. I refuse to answer on the grounds—State and Federal constitution.

Mr. Scotti: Mr. Foreman, it now becomes my duty to appear before the court and makes an application on behalf of this grand jury for a direction from the court to this witness.

(Mr. Scotti, Mr. Andreoli, the Foreman, the witness, and the stenographer leave the grand jury room.)

And the Court, on the said day, after hearing argument by counsel for the said James T. Stevens, and the District Attorney, and having then and there decided that the said questions were legal, proper and relevant, and no lawful reason being given by the said James T. Stevens for not having answered the questions, did direct said James T. Stevens to answer one of the questions, and the said James T. Stevens did then and there refuse to answer the said question.

The following proceeding took place in Part 30 of the Supreme Court of the County of New York on July 22, 1964:

[fol. 19]

* * * * * * *

The Court: Mr. Stevens, I am directing the Court Reporter to read to you the question that was submitted to you and about which you were interrogated by Mr. Scotti before the First June 1964 Grand Jury, which Grand Jury I understand granted you immunity, and I understand that you signed a limited—

Mr. Scotti: No—before which he executed a waiver of immunity.

The Court: I say he executed a limited waiver of immunity, and under the circumstances I direct the Reporter to read the question to you. Go ahead.

Grand Jury Reporter:

"Question by Mr. Scotti:

"Question: Now I am going to ask you point-blank in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity: Did you during the last five years receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct

their gambling operations in violation of the Penal Law of the State of New York? Did you?

"Answer: I refuse to answer on the grounds stated in the State and Federal Constitution."

The Court: Now, Mr. Stevens, having heard the question read to you by the Court Reporter, that is my question to you, and I direct you to answer it. What is your answer?

Mr. Stevens: I stand on my Constitutional rights, your Honor.

The Court: All right. Under the circumstances of your refusal to answer, the Court finds you guilty of criminal contempt of this Court and will pronounce sentence upon you Friday—

Mr. Molony: I would like a week.

The Court: Is there any objection to Tuesday?

Mr. Scotti: Tuesday I have no objection.

[fol. 20] The Court: Tuesday, July 28, 1964. And you are to appear in this Court at 11:00 A.M. on July 28th for that purpose.

Mr. Scotti: May I respectfully suggest to the Court that the record show that this witness has refused to comply with the direction? He merely said, "I stand on my Constitutional rights" and has not indicated—

The Court: That is a refusal. Do you refuse to answer the question?

Mr. Stevens: I do, sir, on my Constitutional rights.

The Court: Now, in the interval, counsel—Mr. Molony, is it?

Mr. Molony: Molony.

The Court: If you have any memorandum to submit to me before Tuesday, I will be glad to receive it; and send it to my chambers.

Mr. Molony: Yes, your Honor. May we have argument on Tuesday at 11:00 or just submit a memorandum?

The Court: Well, you come down Tuesday; and after I see the memorandum, perhaps it may need argument. All right.

Mr. Molony: Thank you, your Honor.

Mr. Scotti: Thank you, your Honor.

The court then permitted counsel for James T. Stevens to submit a memorandum of law on July 28, 1964 and heard reargument by Counsel and the District Attorney.

The witness James T. Stevens having on July 22, 1964 contumaciously and unlawfully refused to answer the questions put by the court,

It is therefore summarily

[fol. 21] ORDERED AND ADJUDGED that the said James T. Stevens is guilty of contempt of Court in having committed the act set forth, and it is

ORDERED AND ADJUDGED that for the said criminal contempt of court, the said James T. Stevens be directed to pay a fine of $250 and be committed to the custody of the Sheriff of City of New York at Civil Jail, 434 W. 37 St., City, County and State of New York for a term of 30 days, the execution of said order to be stayed for five days from the service of the mandate to permit the witness to apply to the appellate division for a stay.

CHARLES MARKS
J.S.C.

[fol. 22]

EXHIBIT 2 TO PETITION

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE, ET AL.

WAIVER OF IMMUNITY

I, LT. JAMES T. STEVENS residing at 164 Engert Ave—Bklyn., occupying the office of Police Officer in the Police Dept. of the City of New York, do hereby waive all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the nomination, election, appointment or official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury.

Dated: New York, N. Y., June 26, 1964.

/S/ JAMES T. STEVENS

WITNESS:

/S/ JEROME P. CRAIG

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On this 26 day of June, 1964, before me personally appeared JAMES T. STEVENS to me personally known and

known to me to be the individual described in and who executed the above waiver, and he duly acknowledged to me that he executed the same.

/s/ JANET D. WINSTON

JANET D. WINSTON
Notary Public, State of New York
No. 03-4309493
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1965

[fol. 23]

EXHIBIT 3 TO PETITION

(Seal)

POLICE DEPARTMENT
CITY OF NEW YORK
NEW YORK 13, N. Y.

July 15, 1964

Mr. James T. Stevens
164 Engert Avenue
Brooklyn, New York

Dear Sir:

I have been directed to inform you that you having appeared before the Third July, 1964 Grand Jury of the County of New York, on the 15th day of July, 1964, and having refused to waive immunity from prosecution, as required by Section 1123 of the New York City Charter, the Police Commissioner has ordered that your employment as a member of the Police Department of the City of New York be terminated, and your office vacated.

Very truly yours,

/s/ LOUIS L. STUTMAN
Louis L. Stutman
Chief Clerk

[fol. 24]

EXHIBIT 4 TO PETITION

Mr. Molony

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL AND TRIAL TERM : PART XXX
JUNE 1964 TERM CONTINUED

In the Matter

of

the Application by the District Attorney, New York County, for a Direction to James T. Stevens, a Witness before the First June 1964 Grand Jury.

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100 Centre Street,
New York 13, N. Y.,
July 28, 1964.

Stenographer's Minutes

MICHAEL J. MICKELL, C. S. R.,
Official Stenographer.

[fol. 25]

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL AND TRIAL TERM : PART XXX
JUNE 1964 TERM CONTINUED

In the Matter

of

the Application by the District Attorney, New York County, for a Direction to James T. Stevens, a Witness before the First June 1964 Grand Jury.

---

100 Centre Street,
New York 13, N. Y.,
July 28, 1964.

Before:

HON. CHARLES MARKS, J.

APPEARANCES:

For the People: MESSRS. MOLONY & SCHOFIELD,
Chief Assistant District Attorney,

and

PETER D. ANDREOLI, Esq.,
Assistant District Attorney.

For the Witness: ALFRED J. SCOTTI, Esq.,
137 South Main Street,
New City, Rockland County,
State of New York,
By Gerard E. Molony, Esq.,
Of Counsel.

[fol. 26] The Clerk: Part XXX is now in recess. Part XXX, June 1964 Term, is now in session.

This is a witness before the June, 1964, Grand Jury, the First Grand Jury. The name of the witness is James T. Stevens.

Counsel, will you put your name on the record.

Mr. Molony: Molony & Schofield, 137 South Main Street, New City, Rockland County, New York, by Gerard E. Molony.

Your Honor, I would like a few things stipulated to complete the record. I think the record is in pretty good shape.

Mr. Scotti, will you stipulate that—I would like the District Attorney to stipulate, first, that Officer Stevens became a member of the New York City Police Department on September 16, 1946.

Mr. Scotti: That is the information. I so stipulate, Your Honor.

Mr. Molony: That a notice, dated July 15, 1964, was sent to Officer Stevens telling him that he was discharged from the New York City Police Department.

Mr. Scotti: Yes.

The Court: So stipulated.

Mr. Molony: A stipulation that no relevant testimony [fol. 27] was given by Officer Stevens at any of his four appearances before either the June or the July Grand Jury.

Mr. Scotti: I do not so stipulate, Your Honor. The record speaks for itself.

Mr. Molony: May we see a copy of the Grand Jury minutes of those appearances, Your Honor?

Mr. Scotti: I will be delighted to show it to His Honor.

The Court: Did I understand you, Mr. Molony, to say "no relevant testimony"?

Mr. Molony: That's right, Your Honor.

[Thereupon, a transcript of the Grand Jury Minutes referred to was submitted to the Court and the Court perused the same.]

The Court: An examination of the testimony in which this witness, James T. Stevens, appeared before the First June 1964 Grand Jury indicates and shows that certain questions were asked of this witness and that he signed a limited waiver of immunity. There were other questions asked of him with reference to his position and a financial questionnaire was given to him at that time to sign. That is the First June 1964 Grand Jury so that there will be no question about it.

[fol. 28] He was again called before the Third July 1964 Grand Jury and it was at that time that he refused to testify either before the First or the Third Grand Jury, the First June 1964 Grand Jury or the Third July 1964 Grand Jury; and he refused to sign a limited waiver of immunity for the Third July 1964 Grand Jury; and he asked at that time to, using his words, I think, to have his partial waiver nullified.

Mr. Molony: Your Honor, what I am trying to clarify —I don't know whether I am making myself clear—is, just assuming for the sole purpose of argument that Officer Stevens did not give any relevant testimony, he didn't waive his rights unless this limited waiver was executed.

The Court: Well, what you call "relevant testimony" may have been considered by someone to be relevant. It is a question whether an answer to his name is relevant and other things are not relevant questions and relevant testimony; particularly, in view of the nature of the investigation, that they are relevant, because, if you ask it of a bootblack, it need not be relevant, although it might be there.

Mr. Molony: Do any questions do more than identify the witness, Your Honor?

[fol. 29] The Court: Well, they are part of the relevancy of the entire matter.

Mr. Molony: May we have the limited waiver of immunity, which it is alleged that Officer Stevens signed, put into the record, Your Honor? I have never seen it.

The Court: Do you have the limited waiver that he signed?

Mr. Andreoli: The Grand Jury has it. We can get it.

Mr. Molony: May we have a photostatic copy put into the record?

Mr. Scotti: I made that part of the record last time, Your Honor.

The Court: Was it read into the record?

Mr. Molony: No, Your Honor.

Mr. Scotti: I think I made reference to it and I offered to show it to Your Honor. Your Honor said, "I will take your word for it."

The Court: Well, then, we will consider it as part of the record of the case and a photostat will be given to counsel for the witness.

Mr. Scotti: And, Your Honor, may I also suggest that we make the transcript to which you alluded a little while [fol. 30] ago part of the record also.

Mr. Molony: I consent to that, Your Honor.

The Court: All right. Mark it a Court's exhibit.

[The transcript referred to was marked Court's Exhibit 1.]

The Court: And the limited waiver of immunity, signed by the witness for the First June 1964 Grand Jury, shall also be considered in evidence as a Court's exhibit, with the understanding, Mr. Scotti, that a photostat of the same will be placed in the record and a copy thereof given to counsel for the witness.

Mr. Scotti: Yes, Your Honor.

Mr. Molony: May we also have a stipulation that it was on the first occasion that Officer Stevens was represented by attorneys that he asked to withdraw his limited waiver.

The Court: I did not get that.

Mr. Molony: That the first time that Officer Stevens asked to withdraw his limited waiver was the first time he appeared with counsel in this proceeding.

Mr. Scotti: I think it is apparent from the transcript. I can't concede that, Judge. I don't know.

The Court: That he appeared where?

[fol. 31] Mr. Scotti: He appeared for the first time or consulted a lawyer for the first time.

The Court: He didn't say that. "He appeared." There is a difference between "consulted" and "appeared."

Mr. Scotti: I am glad you clarified that.

Yes, I will accept that, to my knowledge.

Mr. Molony: May we also have the record clarified, Your Honor. It is my understanding, based on what was said here the last time in court before Your Honor, that there is no claim that this witness has been given immunity. The claim is that he has signed a valid waiver and that he refused to testify under it, and that is why Your Honor has found him guilty of criminal contempt, is that right?

The Court: That covers the situation.

Mr. Molony: Thank you, sir.

This is in the nature of a motion for reargument under section 2221 of the Civil Practice Law and Rules on the grounds that Your Honor has already found the defendant guilty of criminal contempt, and that the feeling of counsel is that Your Honor overlooked a very relevant and recent decision of the United States Supreme Court. I am referring to the decision in Malloy versus Hogan, which was [fol. 32] decided by the Supreme Court of the United States on June 15, 1964.

Prior to the decision in Malloy versus Hogan, the Fifth Amendment had never been deemed operative as against the states. Every case decided before that had held that the Fifth Amendment was binding in any federal proceeding but not in a state court proceeding.

The Malloy versus Hogan case involved a gambling matter where Malloy had been convicted of a misdemeanor for gambling in Connecticut, was sent to jail on the misdemeanor, later got out, was subpoenaed to appear before a grand jury and to give certain relevant testimony as to who engaged the attorney, paid for the bail bond, and so forth, on his previous conviction. The witness balked and

claimed his rights under the Federal and State Constitutions. The highest court in Connecticut affirmed the order on record on the grounds that there was a one-year statute of limitations on gambling in Connecticut then and one year had already passed, so he had no right as a matter of law to refuse to testify, because there was nothing that they could prosecute him for, since the statute had run.

The appeal came to the United States Supreme Court, a seven-to-two decision. As to the question of constitutionality, Judge Brennan held that the clause of the Fifth [fol. 33] Amendment saying a person had a right not to incriminate himself is now binding on the states through the Fourteenth Amendment.

This is a major reversal of all the laws which existed in the United States prior to that decision. The practical effect of it is it overrules the Regan case, which I think Your Honor relied on when you found this gentleman guilty.

I think it is accepted that the Fifth Amendment now applies to the states. There is no doubt about this.

Originally, the New York State Constitution—Article I, subdivision 6, is the immunity statute— gave to all citizens, except there is one particular subdivision of Article I, subdivision 6, which applies to public officers, which we will concede would apply to Officer Stevens in this case, which says that, in the event any public officer refuses to waive immunity before a grand jury, he is to be discharged and cannot hold public office for the following five years; and there is a provision of the New York City Charter, section 1123, which is to the same effect. Under this section 1123, under which Mr. Stevens received notice that he was no longer a member of the New York City Police Department, he has [fol. 34] a constitutional right not to give evidence against himself. No statute, no state constitution, can take away that right or in any way limit it.

Here we have a situation where if that section of the New York State Constitution can still be held valid, their refusal

to follow the supremacy of the Federal Constitution—furthermore, the Federal Court never held that the Fifth Amendment is effective against any state—the provision in the State Constitution would be valid and the provision in the Charter based on the state provision would be valid.

Now, the Supreme Court has said this man has the same rights that we have in any federal prosecution; and I think that the decision of Justice Black—he dissented in the Regan case—will now be held to be the law in the United States today based on the decision of Justice Brennan in the Malloy versus Hogan case.

Justice Black said that the effect of allowing such a situation where a man goes to such a job where he has got to waive his constitutional rights would mean that any private employer could also say to a person that goes to work, "You can only work for me if you sign an agreement now [fol. 35] that you will not claim the Fifth Amendment against self-incrimination, nor claim the provision you are entitled to counsel, nor claim the provision you can't have any illegal search."

I say this would certainly be obnoxious. There is no provision that I could find in the Federal law which in any way requires any Federal employee to sign any waiver or that he will lose his job. There may be some. I can't find them.

The Court: Frankly, interrupting you for a moment, which I don't usually like to do, I don't see anything in the Malloy against Hogan case which indicates there is any violation of the Constitution in the statute which requires a man, if he does not sign a waiver, that he may be discharged. Where is there anything in the Malloy case to that effect? I have read through it this morning.

Mr. Molony: That is from the dissenting opinion in Regan versus the State of New York.

The Court: Then your argument is that the dissenting opinion in the Regan case is now supported by the Malloy case. Well, that I can't see. It is a long opinion, and I had to read it rather hastily this morning; but from what I read, I can't see that.

[fol. 36] Mr. Molony: You can't see where the dissenting opinion of Justice Black stated—

The Court: On that question.

Mr. Molony: On signing a waiver?

The Court: That's right.

Mr. Molony: Well, if you have a constitutional right, no statute can take away the constitutional right; no state constitution can take away the constitutional right given to you by the Federal Constitution.

So it is our claim here that the Federal Constitution now gives any public officer in New York State and anywhere else, makes him coequal with any other citizen who is not in public employment, and he can still claim the Fifth Amendment, but—

The Court: And it is your contention that this statute—the New York State and the Administrative Code are both in violation of the United States Constitution?

Mr. Molony: That's right. Or the New York State constitution is in violation, and the New York City Charter provision, section 1123; and it is also our contention here, Your Honor, that this witness gave no relevant testimony, without Your Honor passing on the constitutional ques-[fol. 37] tion, and Your Honor can so decide, that this witness gave no relevant testimony and had a right to withdraw his limited waiver of immunity; that he was no longer a member of the Police Department when he appeared before Your Honor for sentence.

If that provision has any binding effect here, it certainly has this binding effect. After he left the Police Department in the Regan case, in the situation where Regan had signed a waiver, it wasn't until after eighteen, twenty months that he signed a waiver, that he objected and asked to withdraw. That is not the practical situation here.

We also claim that Stevens was entitled to be advised by counsel from the very beginning of this proceeding. He was advised by the District Attorney as to his rights. We say he was improperly advised. This was after June, June 15, 1964, and he was told that if he didn't sign a limited

waiver of immunity, he would lose his employment, after almost eighteen years in the Police Department and six citations for meritorious duty.

We say that this is coercion, which is referred to in the Malloy case—the slightest bit of coercion—and doesn't take [fol. 38] away the man's rights to raise a constitutional question; for certainly his employment, his livelihood, that he had worked at all his adult life, to be discharged from that employment would certainly be that type of coercion which would compel him to sign a limited waiver.

The Court: Are you through?

Mr. Molony: Yes, Your Honor.

The Court: All right.

Do you want to say anything, Mr. Scotti?

Mr. Scotti: Your Honor, with all due respect to Mr. Molony, I hardly think it is necessary for me to make a reply, although duty requires that I do so; and, Your Honor, pardon me if I appear to be belaboring what is absolutely obvious to you.

Now, I read those cases, too, before he made this argument this morning. I don't see any connection between the Malloy case and the Hogan case.

Mr. Molony: They are both the same cases.

The Court: You mean Malloy against—

Mr. Scotti: Malloy against Hogan, and the other—

The Court: The Regan case.

Mr. Scotti: No. There is another case that involved a confession which you also quoted in your memorandum, [fol. 39] which I first looked at speedily.

The Court: The other case is the—

Mr. Scotti: All right. It doesn't make any difference.

The Court: —Slochower case.

Are you talking about the Board of Education, the teacher, Slochower?

Mr. Scotti: I don't think that was the case, Your Honor, but I recall the substance of the decision. That is more important.

As Your Honor brought out a little while ago, the Malloy case did not involve the execution of a waiver of im-

munity. It simply involved a matter of interpretation of the standard required for the valid assertion of the constitutional privilege against self-incrimination.

The Supreme Court in Connecticut maintained that the bookmaker, who had been previously convicted, invoked his privilege frivolously; there was no danger of his incriminating himself. Whereas, the Supreme Court of the United States maintained it wasn't frivolous and the witness had a valid reason for invoking his privilege. In other words, no matter how insignificant the testimony may be, if it con- [fol. 40] stitutes the slightest link in a chain of evidence that might ultimately result in the establishment of the crime for which he could be convicted, then it would provide a proper basis for the invocation of his constitutional privilege against self-incrimination. That is all there was to that decision.

Here we have a valid execution of a waiver of immunity.

Now, in the Regan case, that same question was brought up. Regan had not given testimony in the sense that counsel now urges. You had an exact parallel there. He executed a waiver of immunity and was requested to fill out a financial questionnaire. Looking at the financial questionnaire, he decided to change his mind and he wouldn't like to answer the questions and, therefore, chose to withdraw the waiver of immunity.

Suffice it to say that our courts sustained the contention of the People that the execution of the waiver of immunity was valid; and the Supreme Court of the United States, not even taking a position as to whether it was valid or not, said that the witness was obligated to answer a legal and [fol. 41] proper interrogatory. So that the issue was premature. In other words, if the waiver of immunity is valid, then the testimony can be used against him. On the other hand, if the waiver of immunity is not valid, then he receives immunity. But, under any circumstances, he is presently legally obligated to answer the question.

And that was the position taken by Justice Reed.

So that the Supreme Court took the position it did not wish to pass on the question as to whether the execution of the waiver was valid or not.

Our Court of Appeals, however, did maintain that it was valid and for good reason. After all, it is not for him to change his mind after he finds out what the People are going to ask him; and I think it was quite apparent in the brief examination of the witness at the time that he was going to be asked certain questions concerning his financial status. In fact, he was asked to fill out a financial questionnaire. So at that time he knew what line the interrogation would take, and it would be improper and completely unjustified at that time for him to change his mind.

So that, Your Honor, we have here no basis at all for the contention now made by the counsel for the witness. You have a valid execution of a waiver of immunity and, [fol. 42] therefore, he is legally obligated to answer the obviously proper and legal questions put to him. The last one, you recall, Your Honor, was the one that you repeated in open court, and there is no question about the relevancy and materiality of that question, because it goes to the very heart of this investigation.

So that, Your Honor, I urge that judgment in this instance be executed.

Mr. Molony: Now, may I have a chance to reply to Mr. Scotti—

The Court: Yes.

Mr. Molony: —just to clarify a point.

The Supreme Court of the United States makes an analogy between confessions and the right to not testify in a Grand Jury proceeding. The Malloy versus Hogan case was a right not to testify in the Grand Jury proceeding.

I would like to read just a few sentences which answer the point made by Mr. Scotti as to the question of signing this waiver. Our claim is that he was coerced into signing a waiver, and we feel this is something that Your Honor has to pass on today. Under the Malloy decision, if Your

Honor finds that he was coerced into signing a waiver, [fol. 43] then the conviction of criminal contempt cannot stand.

I have the Lawyers' Edition of the Supreme Court decision. You may have one of the others, but I don't know if I am reading from the same page. I have the Lawyers' Edition.

The Court: The Lawyers' Edition.

Mr. Molony: Is that what you have, Your Honor?

The Court: Lawyers' Edition.

Mr. Molony: I am reading from page 658, the third column, towards the bottom:

"'In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself."' Under this test, the constitutional inquiry is not whether the conduct of the state officers in obtaining the confession was shocking, but whether the confession is 'free and voluntary.'"

This is the important part from our point of view:

"'. . . that is, it must not be extracted by any sort of [fol. 44] threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .'"

It then continues after the citation of cases.

"In other words, the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed."

Now, we claim the coercion here, Your Honor, was the taking of this man's livelihood away and is far greater than

the coercion in Haynes versus Washington. We say, if Your Honor finds coercion—this man only signed a waiver because it meant his job, and this meant coercion—we think that, under the decision and the law, Your Honor must find that this man has not committed any criminal contempt and is not bound by the—

The Court: In reading the Malloy case in connection with other cases, you overlook the fact that to become a member of the Police Department of the City of New York is a privilege and it is nothing he is compelled to do; and there has been some case where they refused certiorari on [fol. 45] a member of the bar of the State of New York—

Mr. Molony: That is the Cohen case.

The Court: The Cohen case, that's right. —where there was no coercion ordinarily because it was a privilege, and under the privilege one is not being coerced if he is asked to sign a waiver of immunity under the statute.

Mr. Molony: May it please the Court—Mr. Scotti, if you don't mind—the difference in the Cohen case is that he has no right to claim his privilege under the Fifth Amendment, because the Fifth Amendment doesn't apply to the states.

I say that prior to Malloy, the state could do anything they wanted with their public employees, because it was not in violation of the Federal Constitution, since the Fifth Amendment did not apply. I say that the Cohen case or any case decided before June 15—

The Court: I don't see that the Malloy case extends it that far, particularly in this case, where an examination of the testimony taken in the Grand Jury at the time that the limited waiver of immunity was signed by the witness indicates nothing, as a matter of fact, to warrant the find-[fol. 46] ing that there was any coercion used at that particular moment. I assume your claim of coercion is that he had hanging over him the fact that, if he didn't sign it, there would be an automatic discharge.

Mr. Molony: And he was so informed by the Assistant District Attorney.

The Court: That is true.

Mr. Molony: As to that fact.

The Court: That is true.

Mr. Molony: And where the Assistant District Attorney does not properly advise on the law—I don't say this with any reflection on the District Attorney; no reflection on him—

The Court: I understand you, but I don't see where the Malloy case extends it that far. In any event, it is quite evident, in my opinion, that the execution of the limited waiver of immunity is a valid execution thereof, and is still valid.

Mr. Molony: That would be like someone making a confession, and maybe through the confession you find proof, and then the court overules the confession.

The Court: When that point reaches the United States Supreme Court, anything can happen. I have seen a lot of [fol. 47] changes in the last few years in their decisions; and I am now reading the Wainwright case.

Mr. Molony: Gideon versus Wainwright.

The Court: "Gideon's Triumph." I went out to the book store and paid $4.95 to read the book, because it is a very interesting book and it has some interesting facts in it.

What's wrong with that, when a judge spends $4.95 to read a book?

I don't quite agree with you, Mr. Molony, because, in reading this—I said I read it through rather hastily because it is a long opinion—and I have read the Regan case definitely, and to me it seems that the Regan case has not been overriden.

Mr. Molony: The Regan case holds that a person in a state court proceeding is not given protection under the Fifth Amendment. That is contrary to Malloy, Your Honor.

The Court: But the other part of it is a question as to whether or not he may revoke a waiver or the signing of a waiver of immunity. There is nothing in the Malloy case which refers to that. I understand your theory—that the waiver has been coerced by reason of the fact that there

[fol. 48] was, if not a direct threat, an implied threat under the state laws that then existed and still do exist, that he would lose his job and be discharged automatically.

Well, that is a matter for the higher courts to decide. I am not going to decide contrary to what I believe to be the law at this time.

Mr. Molony: Your Honor, will you give us a stay, then, of the sentence for three days?

The Court: Therefore, since this is in the nature of a reargument, having granted the application for reargument, I adhere to my original decision and find the witness in criminal contempt of this court, and I fine the witness the sum of $250 and thirty days in the Civil Jail of the City of New York.

On the question of the stay, I want to hear what the District Attorney states on the execution of that sentence.

Mr. Scotti: What is the purpose of the stay?

Mr. Molony: Getting the man out pending appeal. We feel we have a constitutional question and we would like to litigate it; and it doesn't do our man much good to be in jail for thirty days and get a Pyrrhic victory.

Mr. Scotti: No objection, Your Honor.

[fol. 49] Mr. Molony: Thank you, Your Honor.

The Court: You are going to file, I assume, an appeal from this decision.

Mr. Molony: We are going to file an appeal.

The Court: On the question of a stay—until the decision of the Appellate Division?

Mr. Scotti: There is a procedural matter involved here.

The Court: May I get your thought on this, Mr. Scotti. I had intended to grant a stay until the application is made to the Appellate Division—

Mr. Molony: Yes, Your Honor.

The Court: —for a stay pending appeal to that court. Now, to be honest with all of you here, I don't know how those applications are taken care of during the summer months.

Mr. Molony: We will try to figure it out, Your Honor. I understand over in the Second Department that they go to a Justice of the Appellate Division. I understand they do here, sir, too.

The Court: I think there is always a Justice of the Appellate Division sitting in the First Department.

Mr. Molony: I think I have been informed to the contrary, but that may be only hearsay.

[fol. 50] The Court: I know there was someone there because I received two telephone calls last week from two Justices of the Appellate Division, from 25th Street.

Mr. Molony: So, in other words, we have a stay until the Appellate Division passes on it. If they vacate the stay, fine.

The Court: Is there any objection to that?

Mr. Scotti: I have no objection, Your Honor.

The Court: Shall I say the application for a stay should be made within the next—what is today, Tuesday?—the application should be made to the Appellate Division within the next five days, shall we say?

Mr. Scotti: And at that time we will have the mandate drawn up.

The Court: That's right.

Mr. Scotti: So you will have to appeal from the mandate. That is the only suggestion that I have to make.

The Court: Suppose you present the mandate tomorrow.

Mr. Scotti: Tomorrow.

The Court: And you may have five days after the mandate is signed as a stay of the execution thereof for the [fol. 51] purpose of making an application to the Appellate Division for a stay pending appeal.

Mr. Molony: Thank you, Your Honor.

The Court: All right.

Mr. Andreoli: We are giving counsel a photostatic copy of the waiver of immunity signed before the Grand Jury and a photostatic copy is offered as an exhibit.

[The Waiver of Immunity Referred to Was Marked Court's Exhibit 2.]

The Clerk: Part XXX, June 1964 Term, is now in recess. Part XXX, June 1964 Term, is adjourned to September 30, 1964. Part XXX, June 1964 Term, has already been continued and extended to September 30, 1964, subject to being reconvened at any earlier date, subject to any order of the court.

MICHAEL J. MICKELL,
Official Stenographer.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of my stenographic notes, taken during the foregoing proceedings in the above-entitled matter in the Supreme Court of the State of New York, County of New York, Special and Trial Term, Part XXX, June 1964 Term Continued, on July 28, 1964.

/s/ MICHAEL J. MICKELL C.S.R.,
Official Stenographer.

[fol. 52]

In the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York.

Present—Hon. Charles D. Breitel, Justice Presiding; Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon. Samuel W. Eager, Hon. Earle C. Bastow, Justices.

7909

In the Matter of the Application of
James T. Stevens, Petitioner,

for an order pursuant to Section 7801 of the Civil Practice Law and Rules, etc.,

vs.

Honorable Charles Marks, Justice of the Supreme Court of the State of New York, Respondent.

Order Granting Motion to Dismiss the Petition and Dismissing Proceedings—October 30, 1964

The above-named petitioner, James T. Stevens, having presented a petition, verified the 28th day of August, 1964, praying for an order pursuant to the provisions of Section 7801 of the Civil Practice Law and Rules and Section 762 of the Judiciary Law, annulling the order of mandate dated July 30, 1964, and remitting the $250 fine paid by petitioner; and for other relief,

And Hon. Frank S. Hogan, District Attorney, New York County, having filed and served upon the petitioner on the 5th day of October, 1964, a notice of motion, pursuant to Section 7804(F) of the Civil Practice Law and Rules, to dismiss the petition herein as a matter of law; and said

proceeding having duly come on to be heard before this Court on the 6th day of October, 1964,

Now, upon reading and filing the notice of application, dated September 28, 1964, with proof of due service thereof, the petition of James T. Stevens, duly verified the 28th day of August, 1964, and the affidavit of John P. Schofield, duly sworn to the 6th day of October, 1964, all read in support of the petition, and the notice of motion to dismiss the peti- [fol. 53] tion dated October 5, 1964, by Hon. Frank S. Hogan, District Attorney, New York County, with proof of due service thereof, and the affidavit of Michael R. Stack, Assistant District Attorney, duly sworn to on the 5th day of October, 1964, all read in opposition to the application of the petitioner and in support of the motion to dismiss the petition; and after hearing Mr. John P. Schofield in support of the petition and in opposition to the motion to dismiss the petition, and Hon. Frank S. Hogan, District Attorney, New York County, in opposition to the application of the petitioner, and in support of the motion to dismiss the petition; and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the motion of Hon. Frank S. Hogan, District Attorney, New York County, to dismiss the petition as a matter of law, be and the same hereby is granted and the proceeding be and the same hereby is unanimously dismissed, without costs.

Enter:

Vincent A. Massi, Clerk.

[fol. 54] [File endorsement omitted]

[fol. 55]

In the Appellate Division of the Supreme Court held in and for the First Judicial Department at the Court House of the Appellate Division in the County of New York.

Present:—Hon. Benjamin J. Rabin, Justice Presiding; Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon. Samuel W. Eager, Hon. Aron Steuer, Justices.

The Court announces the following decisions:

Breitel, J.P., Valente, Stevens, Eager and Bastow, JJ.

7909

In the Matter of the Application of
James T. Stevens, Petitioner,

for an order pursuant to Section 7801 of the Civil Practice Law and Rules, etc.,

vs.

Honorable Charles Marks, Justice of the Supreme Court of the State of New York, Respondent.

Memorandum Decision—October 30, 1964

Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of New York, first appeared before the Grand Jury of New York County —which was investigating allegations of bribery and corruption in the Police Department—he signed a limited waiver of immunity. When recalled before that Grand Jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a Justice of the Su-

preme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the Grand Jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to the continued effectiveness of the waiver of immunity. In Regan v. New York, 349 U.S. 58, it was clearly held that one circumstanced as petitioner herein, was required to testify before the Grand Jury. If the waiver were invalid, petitioner would have received immunity from prosecution under Sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilige to refuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion [fol. 56] that Regan v. New York is controlling here, we do not reach the question as to the effect of Mallory v. Hogan, 378 U.S. 1, and Escobedo v. Illinois, 378 U.S. 478, on the constitutionality of Article I, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and it must be determined whether he has accordingly received immunity or has effectively waived immunity. Order filed.

[fol. 57]

IN THE APPELLATE DIVISION OF THE SUPREME COURT

FIRST JUDICIAL DEPARTMENT, COUNTY OF NEW YORK

In the Matter of the Application of

JAMES T. STEVENS, Petitioner,

for an order pursuant to Section 7801 of the Civil Practice Law and Rules, etc.,

vs.

Honorable CHARLES MARKS, Justice of the Supreme Court of the State of New York, Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS—Filed November 25, 1964

SIR:

Take Notice that upon the annexed affidavit of Gerard E. Molony, Esq., verified the 10th day of November, 1964, upon the record on review, the memorandum decision, the order of this court and all other papers herein, the petitioner will move this court, at a term thereof, to be held at the Appellate Division Courthouse at 25th Street and Madison Avenue, Borough of Manhattan, City and State of New York, on the 17th day of November, 1964, at 1:00 o'clock in the afternoon or as soon thereafter as counsel can be heard, for an order granting the Petitioner leave to appeal to the Court of Appeals from the Order of this Court dated the 30th day of October, 1964, dismissing the Petition together with such other and further relief as to the Court may seem proper.

Dated: New York, N. Y., November 10, 1964.

Yours, etc.,

Molony & Schofield, Attorneys for Petitioner, 137 South Main Street, New City, Rockland County, New York.

To: Hon. Frank S. Hogan, District Attorney, New York County, 155 Leonard Street, New York, New York.

[fol. 58]

ATTACHMENT TO NOTICE OF MOTION
AFFIDAVIT OF GERARD E. MOLONY

State of New York,
County of New York, ss.:

Gerard E. Molony, being duly sworn, deposes and says:

That I am an attorney duly licensed to practice law in the State of New York and I am a member of the firm of Molony and Schofield located at 137 South Main Street, New City, Rockland County, New York, attorneys for Petitioner and fully familiar with the facts and proceedings heretofore had.

This affidavit is submitted for the purpose of obtaining permission for leave to appeal to the Court of Appeals pursuant to Section 5602 of the C.P.L.R.

Facts

This was an original proceeding commenced in the Appellate Division by the Petitioner pursuant to Section 7801 of the C.P.L.R. for the purpose of reviewing an adjudication and order and warrant of commitment dated [fol. 59] July 30, 1964 which adjudged the Petitioner guilty of criminal contempt of court.

The petitioner, James T. Stevens, who is a Lieutenant of the New York City Police Department, was given a forthwith subpoena to appear and testify before the June,

1964 Grand Jury. The Petitioner, not having time to get an attorney, was advised of his rights by an Assistant District Attorney. He was told that unless he signed a limited waiver of immunity under Section 1123 of the New York City Charter, that he would lose his position as a member of the New York City Police Department. Petitioner signed the limited waiver of immunity but did not give any material testimony. He was subsequently called before the July, 1964 Grand Jury where the Petitioner appearing with counsel, refused to sign a limited waiver of immunity and asked to withdraw the limited waiver of immunity which he had signed before the June, 1964 Grand Jury.

Petitioner refused to answer questions in the Grand Jury Room relying on his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 6 of the New York State Constitution.

After the Petitioner had signed a limited waiver of immunity, the District Attorney advised him that any evidence which he gave before the Grand Jury might be used to indict him for a crime.

This court by a five-to-nothing memorandum decision sustained the conviction of criminal contempt of the Petitioner. An Order was entered on October 30, 1964.

Law

If the Petitioner answered the relevant questions of the [fol. 60] District Attorney, he would not know whether he would face an indictment for bribery which could result in imprisonment for ten years or whether he had a constitutional right to refuse to answer the questions. It is respectfully submitted by your deponent that the court erred in finding the Petitioner wilfully refused to answer a question before the Grand Jury when the Petitioner could not tell whether it might lead to his indictment for a crime or whether he did have immunity if he gave testimony which would indicate that he had committed a crime.

It is submitted that the Petitioner has lost three great constitutional rights by the decision of this court.

First, the Grand Jury system was created for the purpose of protecting those accused of crime and not for the purpose of protecting the sovereign. Here the Petitioner's conduct in the Grand Jury Room has led to his imprisonment even though he does not know what his rights are and the court has held him in contempt for failing to risk running the gauntlet of convicting himself out of his own mouth rather than by being accused of committing a crime by others.

Second, the courts have recognized that defendants are entitled to be represented by counsel after indictment for a crime. Certainly it is equally as important that a potential defendant subpoenaed to testify before a Grand Jury is entitled to counsel and should certainly be advised of his right to counsel before being asked to sign any waiver of immunity.

Third, the Petitioner's claim of the privilege against self-incrimination under the Fifth and Fourteenth Amend-
[fol. 61] ments of the United States Constitution has been guaranteed to citizens in Federal proceedings since the time of the creation of the United States in 1789 and is now guaranteed to citizens against the action of State governments since June 15, 1964, by the decision of the Supreme Court in the Case of Malloy v. Hogan (378 U.S. 1).

The court, in its Memorandum Decision, relied on the Case of Regan v. New York (349 U.S. 58). At the time of the Regan decision there was no privilege against self-incrimination guaranteed to Regan in a State Court proceeding guaranteed under the United States Constitution. However, the dissent of Justice Black, concurred in by Justice Douglas, is based on a privilege against self-incrimination guaranteed to citizens in State proceedings. Although the major premise on which Justice Black based his dissent in Regan was not the law then, it is the law today

since the Malloy decision and it follows that the reasoning of Justice Black represents the present law today rather than the majority opinion of Justice Reed which antedated the Malloy decision.

Upon information and belief, your deponent is informed that at least 160 members of the New York City Police Department have executed limited waivers of immunity before the July, 1964 Grand Jury, City of New York, County of New York. To your deponent's knowledge, this is the first case on appeal which raises the question of validity of Section 1123 of the New York City Charter and Article I, Section 6 of the New York State Constitution insofar as said section relates to public officers signing limited waivers of immunity. Since there is a likelihood of a multitude of [fol. 62] appeals arising as to the validity of the Charter and State Constitution Sections, it is respectfully submitted that permission should be granted in the sound discretion of this court to allow an appeal to be taken to the highest court of the State so that the new problem raised by the decision of Malloy v. Hogan may be finally answered by the highest court of the State.

Wherefore, your deponent respectfully requests that this court grant permission for leave to appeal to the New York State Court of Appeals.

Gerard E. Molony

Sworn to before me this 10th day of November, 1964.

John P. Schofield, Notary Public, State of New York, No. 44-3524710, Qualified in Rockland County, Commission Expires March 30, 1965.

[fol. 63] [File endorsement omitted]

[fol. 64]

IN THE APPELLATE DIVISION OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT, COUNTY OF NEW YORK

In the Matter of the Application of

JAMES T. STEVENS, Petitioner,

For an order pursuant to Section 7801 of the Civil Practice Law and Rules, etc.,

against

HONORABLE CHARLES MARKS, Justice of the Supreme Court of the State of New York, Respondent.

AFFIDAVIT IN OPPOSITION

State of New York,
County of New York, ss.:

Michael R. Stack, being duly sworn, deposes and says:

1. That he is an Assistant District Attorney regularly appointed in the County of New York and is fully familiar with all the facts and circumstances pertaining hereto.

2. This affidavit is submitted in opposition to a motion seeking permission for leave to appeal to the Court of Appeals pursuant to Section 5602 of the Civil Practice Law and Rules.

3. The petitioner was a lieutenant in the Police Department of the City of New York. On June 25, 1964, he was called upon to testify before a New York County Grand Jury which was, and is currently investigating certain allegations of bribery and corruption in the Police Department of this City. Prior to being sworn as a witness, the petitioner was asked to sign a limited waiver of immunity. He did so after having been advised that he had a right

not to testify, but that if he did not so testify his employment with the City would be terminated. He was also advised that he was a potential defendant and not a witness, and that anything he said could be used against him [fol. 65] at a later proceeding. He thereafter answered a few questions and then left the jury room with instructions to return at a later date with a financial questionnaire, which had been given him, filled out.

4. On July 15, 1964, the petitioner, having been subpoenaed before the Third July 1964 Grand Jury, refused to give any further testimony stating that he wished to withdraw the limited waiver he had previously executed, and also claiming that his right not to incriminate himself and his right to counsel under the Federal and State Constitutions had been violated. The next day, pursuant to the applicable provision of the New York State Constitution and the New York City Charter, his employment as a police lieutenant was terminated.

5. On July 22, 1964, he was brought before the First June 1964 Grand Jury (before which he had originally executed the waiver and testified) and was asked the following question:

> "Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operation in violation of the Penal Law of the State of New York, did you?"

6. He again refused to reply, and was forthwith brought before Justice Charles Marks, of the New York State Supreme Court, the respondent herein, and asked the identical question. Although petitioner was warned that a failure to answer would result in his being held in criminal con-

tempt of court, he wilfully persisted in his refusal to reply to the question, and was, accordingly, held in contempt.

7. Upon the application of his attorneys, execution of sentence was postponed for five days for the purpose of [fol. 66] making application to the Appellate Division for a stay pending appeal. On August 4, 1964, the Honorable Bernard Botein, Presiding Justice of the Appellate Division, First Department, refused to grant a stay of execution of the contempt pending appeal, and shortly thereafter the petitioner was incarcerated.

8. While petitioner was serving his 30 day sentence, he applied to the Southern District Court for a writ of habeas corpus on the basis that his right not to incriminate himself and his right to counsel had been violated in the State court proceedings. The Honorable William B. Herlands, District Judge, denied the petition on the basis that petitioner had failed to exhaust his State remedies. Thereafter, this decision was affirmed by the Circuit Court of Appeals.

9. Upon the expiration of petitioner's 30 day sentence for contempt he filed on September 28, 1964, in this Court, a petition to review and annul pursuant to Article 7801 of the Civil Practice Laws and Rules the adjudication and the order and warrant of commitment dated July 30, 1964, adjudging petitioner in criminal contempt of court and punishing him therefor.

10. On the same date [September 28, 1964], he was again called to appear before the First June 1964 Grand Jury but again refused to answer the same question as abovementioned in paragraph 5 and was accordingly held in contempt of court by Judge Schweitzer of the New York State Supreme Court. Justice Schweitzer accorded the petitioner 5 days in which to apply to the Appellate Division for a stay of execution of the sentence pending appeal.

11. The petitioner did not apply to the State appellate court for a stay, but on the day before he was supposed

to surrender himself (October 7, 1964), he petitioned the United States District Court for the Southern District to [fol. 67] remove the proceedings to that court pursuant to Title 28 U.S.C. Section 1443.

12. The District Court McMahon, J., on October 20, 1964, vacated and dismissed the petition for removal noting that

> "It appearing that the petition for removal was not filed until after petitioner Stevens was convicted in the state court, that petitioner seeks to do by indirection what he could not do directly, i.e., test the validity of a waiver of immunity in advance by testifying, and that neither the provisions in the State Constitution nor the New York City Charter, providing for waivers of immunity, violated any State or Constitutional right, the within motion is in all respects granted and the petition for removal vacated and dismissed." 28 U.S.C. §1446 [c]; *Regan* v. *People,* 349 U.S. 58 [1955]; *Potter* v. *Carvel Stores of New York, Inc.,* 203 F. Supp. 462, 466 [D. Md. 1962]; *Biscup* v. *People,* 129 F. Supp. 265, W.D.N.Y. 1955]."

13. Thereafter, petitioner moved for re-argument, said motion was granted, and the original decision adhered to in all respects.

14. On October 30, 1964, petitioner again moved in this Court for an order pursuant to Article 7801 of the C.P.L.R. and Section 752 of the Judiciary Law to review and annul the adjudication by Judge Schweitzer finding him in contempt of court; and for a stay pending these proceedings. The application for a stay was denied (Valente, J.).

15. On November 2, 1964, this Court disposed of the original Article 78 proceeding brought by petitioner against Judge Marks with the following memorandum:

> "Motion to dismiss petition granted and proceeding unanimously dismissed, without costs. When petitioner, a lieutenant in the Police Department of the City of

New York, first appeared before the grand jury of New York County—which was investigating allegations of bribery and corruption in the police department—he signed a limited waiver of immunity. When recalled before that grand jury on July 22, 1964, petitioner refused to answer any questions claiming his privilege against self-incrimination. Petitioner was then brought before a justice of the Supreme Court who directed petitioner to answer. When petitioner persisted in his refusal to answer, he was held in criminal contempt and sentenced accordingly. Petitioner attacks the validity of the waiver of immunity he signed, and contends that in the absence of a valid waiver he was within his constitutional rights in refusing to answer before the grand jury. The adjudication for contempt must be sustained, however, irrespective of any substance to petitioner's argument as to [fol. 68] the continued effectiveness of the waiver of immunity. In Regan v. New York (349 U.S. 58), it was clearly held that one circumstanced as petitioner herein, was required to testify before the grand jury. If the waiver were invalid, petitioner would have received immunity from prosecution under sections 381 and 2447, Penal Law. On the other hand, if the waiver of immunity is still valid, petitioner no longer has any privilege to refuse to testify. Hence, the claimed invalidity of the waiver would be a defense in any subsequent prosecution but not a sufficient excuse to refuse to testify. In view of our conclusion that (Regan v. New York is controlling here, we do not reach the question as to the effect of Mallory v. Hogan (378 U.S. 1 and Escobedo v. Illinois, 378 U.S. 478, on the constitutionality of Article I, Section 6, of the New York State Constitution and section 1123 of the New York City Charter, which require a public servant to testify in any investigation involving his official acts or to forfeit his position. That problem may become pertinent, if and when petitioner has testified, and

it must be determined whether he has accordingly received immunity or has effectively waived immunity."

16. In all of the proceedings outlined above petitioner has urged that he has been deprived of his right to counsel and further that he has been deprived of his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution. He alleges that by reason of the decision in the recent case of *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the dissenting opinion in the *Regan* case [*Regan* v. *New York*, 349 U.S. 58, 1955] is now the law.

17. These propositions were urged in each of the above-enumerated proceedings and were rejected. It is respectfully submitted that in view of the already overwhelming rejection of petitioner's claims there would be no purpose served in allowing petitioner to carry this case to the Court of Appeals. That Court as well as the Supreme Court of the United States in the *Regan* case, *supra*, has already passed on and rejected claims similar to that of petitioner.

18. The assertion of the invalidity of a waiver of immunity at this time is premature.

19. Wherefore, your deponent respectfully requests that [fol. 69] this Court deny petitioner permission for leave to appeal to the New York State Court of Appeals.

Michael R. Stack, Assistant District Attorney.

Sworn to before me this 18th day of November, 1964.

Francis Weisberg, Notary Public for the State of New York, Qualified in New York County, No. 31-9588100, Commission Expires March 30, 1966.

Copy to: Molony & Schofield, Esqs., 137 South Main Street, New City, Rockland County, New York.

[fol. 70] Affidavit of Service (omitted in printing).

[fol. 71]

In the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of November, 1964.

Present—Hon. Charles D. Breitel, Justice Presiding; Hon. Francis L. Valente, Hon. Harold A. Stevens, Hon. Samuel W. Eager, Hon. Earle C. Bastow, Justices.

14

In the Matter of the Application of

JAMES T. STEVENS, Petitioner-Appellant,

For an order pursuant to Section 7801 of the Civil Practice Law and Rules, etc.

vs.

HONORABLE CHARLES MARKS, Justice of the Supreme Court of the State of New York, Respondent.

ORDER DENYING LEAVE TO APPEAL—November 25, 1964

The above named petitioner-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on October 30, 1964

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Gerard E. Molony in support of said motion, and the affidavit of Michael R. Stack in opposition thereto, and after hearing Mr. Gerard E. Molony for the motion, and Mr. Michael R. Stack opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter:

Vincent A. Massi, Clerk.

[fol. 72] [File endorsement omitted]

[fol. 73]

In the Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany.

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 56

In the Matter of the Application of

James T. Stevens, Appellant,

vs.

The Honorable Charles Marks, Justice of the Supreme Court of the State of New York, County of New York, Respondent.

To review and annul &c.

Order Denying Leave to Appeal—February 4, 1965

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

[fol. 74] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 76]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 5, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including June 3, 1965.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 5th day of May, 1965.

[fol. 77]

SUPREME COURT OF THE UNITED STATES

No. 210—October Term, 1965

JAMES T. STEVENS, Petitioner,

v.

CHARLES MARKS, Justice of the Supreme Court of New York, County of New York

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ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department is granted limited to Question 1 presented by the petition which reads as follows:

"1. Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter re-

pugnant to the United States Constitution in that any public officer who refused to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?"

The case is consolidated with No. 290 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.